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No. 79-1970.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

VALENTINE R. CICCONE,
PETITIONER,

v.

TEXTRON INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari.

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Question Presented.

Must an ADEA claimant in a deferral state file his state claim within the 180 days provided by § 626(d)(1) to obtain the benefit of the extended filing period provided by § 626(d)(2) of the Act?

Statement of the Case.

Respondent accepts petitioner's statement of the case with the following exceptions:

1. Respondent does not concede that Rhode Island is a deferral jurisdiction within the meaning of § 633(b) of the Age Discrimination in Employment Act, except that respondent assumed *arguendo* for purposes of its motion to dismiss in the district court that Rhode Island was a deferral jurisdiction.

2. Respondent's argument below, as here, was that petitioner was entitled to the 300 day filing period, § 626(d)(2), only if he had actually filed with a local agency within the 180 day filing period, § 626(d)(1), and needed additional time for federal filing in order to allow the state sufficient time to exhaust its own procedures.

Summary of Argument.

A literal reading of the statute is contrary to the legislative history of the Act, frustrates other clear congressional purposes, and attributes to Congress purposes elsewhere rejected by this court.

Since this court has rejected a statutory construction which would result in a federal remedy that fluctuates with the vagaries of state law, the circuit was compelled to reject a literal reading of the ADEA which would result in a fluctuating federal remedy depending on the actions of state legislatures.

There is a conflict in the Circuits.

Argument.

I. Neither Prior nor Subsequent Decisions of This Court Require a Result Other Than That Reached by the First Circuit.

Subsequent to the filing of this petition, the Court issued an opinion in *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. 4851 (U.S. June 23, 1980), indicating in notes 16 and 19 that it was inclined to read § 706(e) of Title VII literally, absent clear evidence that Congress intended it to be read otherwise. The Court suggested that § 626(d) of the ADEA might be read literally for the same reason and made specific reference to the First Circuit opinion petitioner is seeking to have reviewed.

The statutory schemes for ADEA and Title VII are different. Title VII mandates sequential filing with the state and federal agencies while ADEA permits concurrent filing. In spite of the allowance for concurrent filings, Congress did retain the extended filing period for deferral states when the ADEA was passed. The legislative history suggests that, contrary to a literal reading of the statute, the purpose of the extended filing period was to accommodate those who chose to first file with the state *during the initial federal filing period.*[1]

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[1] "[I]n the case of suits brought by individuals notice of intention to sue must be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred, except that where action *has been commenced* under a state statute this period shall be *extended* to 300 days." (Emphasis added.) Cong. Rec. S.830, Comm. Rep. No. 723, 113 Cong. Rec. 31251 (90th Cong. 1st Sess. 1967).

"[T]he notice to be filed by an individual who wishes to bring suit must be filed within 180 days of the occurrence of the alleged unlawful practice, except that where a state *has undertaken* action in accordance with its laws, an individual must file his notice within 300 days of the alleged unlawful practice." (Emphasis added.) Section by Section Analysis, Cong. Rec. S.830, 90th Cong. 1st Sess., 113 Cong. Rec. 31252 (1967).

Additionally, a literal reading of the statute, if allowed, would frustrate other clear Congressional purposes. Finally, it would require the Court to attribute to Congress an intent to discriminate between both claimants and employers, attributions that this Court has otherwise refused to make.

The § 626(d) language is borrowed from Title VII. *See* 42 U.S.C. § 2000e-5(e). The original Title VII Act required claimants to file with the federal agency within 90 days of the alleged act of discrimination. While the legislative history does not disclose why 90 days was the period specified, courts, including this one, have concluded that the relatively short filing periods in Title VII and the ADEA were for the benefit of employers. For Title VII, *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. at 4854; for ADEA, *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485, 488 (5th Cir. 1974); *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976), *aff'd by an equally divided Court*, 434 U.S. 99 (1977).

Discrimination disputes are not like auto accidents. The occurrence of an accident immediately puts everyone involved on notice that claims may be asserted. An employer may be unaware that an employee believes he has been the victim of discrimination until the employer receives notice of the employee's claim. Claimants are required to file with the federal agency in order to ensure that the employer will receive notice of the claim. The employer, if he believes discrimination has occurred, can then attempt to resolve the matter before damages grow to astronomical proportions. If the employer believes that discrimination has not occurred, he will have an early opportunity to gather his evidence in order to defend against the claim.[2]

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[2] The original House and Senate bills have no filing limitations. *Age Discrimination in Employment, Hearing on H.R. 3651, 3768 and 4221 Before the General Subcomm. on Labor of the House Comm. on Education and*

Another aim of Title VII legislation was that claimants first resort to local agencies. *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1232, n.11 (8th Cir. 1975) (Remarks of Senators Humphrey and Dirkson). To ensure that result, Congress mandated sequential filing. 42 U.S.C. 2000e-5(c). Federal filing was prohibited for as long as 120 days so that the state agencies might first attempt to resolve the dispute.

Congress found that the two Title VII purposes — early notice to employers (accomplished by filing with the appropriate federal agency) and first resort to state agencies — conflict. A Title VII claimant in a deferral state could find himself required to file with the federal agency within 90 days but prohibited from filing with the federal agency for 120 days. Congress then provided an extended filing period of 210 days (90 plus 120) for those in deferral states, so that first resort could be made through state agencies without jeopardizing the federal remedy.

In passing the ADEA, Congress eliminated the sequential filing requirement, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-757 (1979), but retained the extended federal filing provisions. Section 626(d)(2). Since the ADEA has no sequential filing requirement, the federal right is not jeopardized and a claimant can file with the federal agency at any time within the 180 day period.

Labor, 90th Cong., 1st Sess. 1 (1967); and *Hearing on S.788 and 830, Before Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. p.1 & 17 (1967).

Subsequently the Senate Committee adopted filing requirements. In conference, the House yielded. *See* 113 Cong. Record 31248 *et seq.* (1967), 34738 *et seq.* (1967), 35055 (1967), 35133 (1967). During the course of the dispute, Senator Javits commented that the Senate version "deals with some of the concerns of American business that the legislation would be open ended." 113 Cong. Record 35056 (1967).

For commentary at hearing regarding the need for time limitations, *Statement of the Air Transport Association, House Hearings, supra* at 469 and *Senate Hearings, supra* at 221-222.

Therefore, the extended federal filing provision is not necessary to protect claimants against loss of the federal remedy by reason of mandatory sequential filing, and must have some other purpose. Petitioner contends that the plain language of the section means that Congress intended simply to grant claimants in deferral states a bonus of an extra 120 days in which to file. In essence, petitioner contends that Congress arbitrarily created two separate filing periods — one for those in deferral states and another in non-deferral states.

Read literally, § 626(d) requires claimants in non-deferral states to file with the federal agency within 180 days. Claimants in deferral states are granted a 300 day filing period. The only requirement for obtaining the 300 day filing period is that claimant be in a deferral state. A literal reading of § 626(d) requires this Court to assume that Congress intended:

1. To grant a bonus to claimants in deferral states;
2. To require less diligence from claimants in deferral states than claimants in non-deferral states;[3]
3. To grant less notice to employers in deferral states than employers in non-deferral states;
4. To create an uneven federal remedy which fluctuates with the vagaries of local legislation — a concept specifically rejected in *Oscar Mayer* v. *Evans*, *supra* at 761-63; and
5. To have completely abandoned any desire to encourage first resort to local agencies. Since the extended period is available even if claimants do not first try local remedies, the ADEA contains no incentive for claimants to first work through the state.

The above assumptions would have Congress intending to create an illogical and arbitrary scheme. The legislative

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[3] See *Mohasco Corp.* v. *Silver*, *supra* at 48 U.S.L.W. 4854. ("But neither this latter provision nor anything else in the legislative history contains any 'suggestion that complainants in some states were to be allowed to proceed with less diligence than those in other states'.")

history does not support such assumptions. Some are contrary to the express desires of Congress and others have been rejected by this Court.

Respondent submits that Congress, while not mandating that ADEA claimants first resort to state agencies, desired to encourage such resort on a voluntary basis. By retaining the extended filing period, § 626(d)(2), Congress granted an extended federal filing period to those who voluntarily allowed the state to try its hand before resorting to the federal remedy.

It is further submitted that Congress never intended to abandon the early notice provision and give employers in deferral states less notice than those in non-deferral states.

Congress simply intended that claimants who voluntarily resorted first to the state agency *within the 180 day filing period provided by § 626(d)(1) and who thereby put the employer on notice,* be given an additional 120 days for federal filing, during which time the state agency would have time to attempt to resolve the matter locally. By requiring ADEA claimants to file their state claims within the 180 days provided by § 626(d)(1) in order to obtain the benefit of the extended filing period of § 626(d)(2), both of Congress' purposes are accomplished. Since some filing occurs within 180 days, employers in deferral states receive early notice and are treated equally with employers in non-deferral states. Claimants are encouraged to resort to state remedies and those who meaningfully pursue state remedies are given additional time for federal filing if they remain unsatisfied (the opportunity for two bites of the apple). This statutory construction results in the same diligence being required of all claimants, whether they are in a deferral state or a non-deferral state: a uniform federal remedy is provided.

While Congress may not have directly answered the question before the Court, Congressional purposes are apparent from the statutory scheme and the Congressional history. A

literal reading of § 626(d) would frustrate those purposes and would require the Court to assume that Congress intended to provide disparate remedies and to treat employers and claimants unequally. The First Circuit's construction of the statute harmonizes the Act and accomplishes all its purposes. By requiring a claimant to file *somewhere* within 180 days, all claimants and employers are treated equally. Early notice is provided. Those who fulfill Congress' desire that they first try state remedies are granted an extended federal filing period if necessary. As the Sixth Circuit states in *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978), *vacated on other grounds*, 442 U.S. 908 (1979): "This is far from 'judicial legislation' but rather "is" a judicial harmonization of a statutory package which is admittedly less than a model of clarity. This is a proper function for courts and one we are called upon to perform regularly."

Respondent recognizes that the ADEA is humanitarian legislation where laymen initiate the process. However, solely because a claimant would receive broader rights, the Court should not construe the statute in a manner thwarting clear Congressional purposes and requiring the Court to attribute discriminatory intent to Congress.

Petitioner also contends that the First Circuit's opinion is contrary to the decision of this Court in *Oscar Mayer & Co.*, 441 U.S. 750 (1979). In effect, petitioner contends that *Oscar Mayer* compels the conclusion reached by the Ninth Circuit. *Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979).

In the present case, the question was whether an ADEA claimant in a deferral jurisdiction must file his state claim within the 180 day period provided by § 626(d)(1) in order to obtain the benefit of the extended filing period provided by § 626(d)(2). That question was not before the Supreme Court in *Oscar Mayer* since claimant there had filed with the federal agency within 180 days of the alleged act of discrimination.

Evans v. *Oscar Mayer & Co.*, 580 F.2d 298, 299 (8th Cir. 1979).

The question of state filing in *Oscar Mayer* was whether a *timely* state filing was an ADEA jurisdictional prerequisite. This Court answered in the negative and held state limitation periods irrelevant to ADEA jurisdiction so that a state's limitation period would not, in effect, become the federal filing period. The Court rejected the concept that the federal remedy was intended to fluctuate in accordance with the vagaries of state legislation.

In response to the argument that such a holding would encourage claimants to bypass state procedures, the Court noted that states could avoid the problem by providing 180 day filing periods and staying that period in the event of a federal filing. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 764, n.11. Thus, the Court emphasized the 180 day filing period and the need for a uniform federal remedy.

Petitioner in this case contends that the First Circuit's holding that the state filing must be within 180 days of the alleged act of discrimination is inconsistent with this Court's holding in *Oscar Mayer* that the state filing may be made at any time. Petitioner ignores the fact that the holdings were made in different contexts and for different purposes.

In this case the Circuit held that a claimant must file with the state within 180 days in order *to obtain the benefit of the extended filing period under the federal act*. To hold otherwise would simply grant a 120 day bonus to those in deferral states. A claimant in a non-deferral state would be required to file within 180 days. A claimant in a deferral state would have 300 days. The federal remedy would fluctuate depending on the vagaries of state law — the very result the Court sought to avoid in *Oscar Mayer*.

In *Oscar Mayer*, the Court also emphasized Congressional purposes as evidenced by the legislative history and the Act it-

self. The First Circuit likewise looked to Congressional intent. The statutory sections in question were intended to provide early notice to employers, § 626(d)(1), and encourage first resort to local agencies. Section 633(b). Where these purposes conflicted so that first resort to the state agency might jeopardize the federal remedy, Congress provided an additional 120 days for federal filing to give the state time to try its hand, § 626(d)(2). To accomplish both purposes, the Circuit held that a claimant must actually file with the state within the 180 days provided in § 626(d)(1) in order to obtain the extended filing period of § 626(d)(2). If the state filing occurs within 180 days, early notice to employers is provided. If such state filing is made (fulfilling the Congressional purpose), claimant receives an additional 120 days for federal filing and his opportunity for federal remedy is not jeopardized while the state attempts to resolve the matter locally.

If petitioner's interpretation is accepted, the Congressional intent to provide early notice (180 days) is frustrated in deferral states. Such interpretation also eliminates any incentive for claimants to resort first to local agencies since they would receive the extended filing period even if they did not first resort to state remedies. The extended filing period becomes a gratuity to those in deferral states. Finally, such an interpretation creates a fluctuating federal remedy dependent on the actions of local legislatures.

Thus, there is no conflict between *Oscar Mayer* and the First Circuit's decision, and *Oscar Mayer* actually requires the result reached by the First Circuit.

II. There is a Conflict Between the Circuit Courts of Appeal.

Respondent agrees that the Ninth Circuit Court of Appeal has rendered a conflicting opinion on the precise issue before

the Court. *Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979). It should be noted that the First Circuit is the first Court of Appeals to have considered the question subsequent to *Oscar Mayer & Co.* v. *Evans, supra*, where the court has had the benefit of briefs and argument of counsel regarding the impact of *Oscar Mayer*.

In *Bean*, the primary issue before the Court was whether state filing was a prerequisite to a federal suit brought under the ADEA. Apparently the Ninth Circuit was aware that the same question was before this Court in *Oscar Mayer*. The *Oscar Mayer* opinion issued on May 21, 1979 held state filing mandatory. The Court also held that compliance with state filing period limitations was irrelevant to ADEA jurisdictional questions. Otherwise, the state filing limitations would become, in effect, the federal limitation period, again resulting in a fluctuating federal remedy dependent on the actions of local legislatures.

The *Bean* court, without noting the context of the *Oscar Mayer* holding, concluded that the *Oscar Mayer* holding that state limitation periods are irrelevant compelled the conclusion that an ADEA claimant in a deferral state is entitled to 300 days in which to file with the federal agency.

The issue before the First Circuit and this Court, however, does not relate to compliance with state limitation periods. The issue is whether an ADEA claimant simply receives a 120 day bonus filing period by virtue of being in a deferral state, or whether he must actually resort to the local agency within the 180 day filing period provided by § 626(d)(1) in order to obtain the extended period provided by § 626(d)(2). The only filing periods in question are federal. The Ninth Circuit did not consider the question in that context and consequently did not consider the Congressional purposes of providing a 180 day notice to employers and encouraging first resort to local agencies. It did not consider this Court's rejection in *Oscar Mayer*

of a statutory interpretation that results in the federal remedy fluctuating with the vagaries of diverse state statutes.

The First and Ninth Circuits offer differing answers because, in essence, they were addressing different questions. The other circuits addressing this question have rendered opinions consistent with the First Circuit. *Ewald* v. *Great Atlantic & Pacific Tea Co.*, 22 FEP Cases 1263 (6th Cir. May 5, 1980); *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978) (dictum), *vacated on other grounds*, 442 U.S. 908 (1979); *Davis* v. *Calgon Corp.*, 22 FEP Cases 1761 (3d Cir. June 10, 1980) rehearing granted in light of *Mohasco Corp.* v. *Silver*, (79-2606, 3d Cir. July 1, 1980); *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 n.5 (3rd Cir. 1977) (dictum), *cert. denied*, 439 U.S. 821 (1978).

Conclusion.

Since the Circuit Court had adequate evidence of Congressional purposes before it, it permissibly construed the statute in a manner consistent with those purposes.

The Petition for Certiorari should be denied.

Respectfully submitted,

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